

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TONY A LUCERO,  
Plaintiff,

v.

AMERICAN HOME MORTGAGE et al.,  
Defendants.

No. C 09-2879 CRB

**ORDER CONDITIONALLY  
GRANTING PLAINTIFF'S REQUEST  
FOR RELIEF FROM JUDGMENT**

On April 29, 2010, the Court dismissed this case for failure to prosecute and entered Judgment in favor of Defendants. Eight days later, Plaintiff filed a Rule 60(b)(1) Motion for Relief from the Judgment. That Motion is now pending before this Court.

As explained below, the Court will GRANT Plaintiff's motion on the following condition: Plaintiff must post a bond with the Court in the amount of \$11,746.00 within 30 days of the date of this Order. If Plaintiff posts the required bond by the deadline, the Court will GRANT the requested relief. Otherwise, Plaintiff's motion will be DENIED.

**DISCUSSION**

Federal Rule of Civil Procedure 60(b)(1) provides:

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertance, surprise, or excusable neglect.

1 Whether a party's neglect is excusable is an equitable determination that "tak[es] account of  
2 all relevant circumstances surrounding the party's omission." *Pioneer Inv. Services Co. v.*  
3 *Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993). These circumstances  
4 include "the danger of prejudice to the [opposing party], the length of delay and its potential  
5 impact on judicial proceedings, the reason for the delay, including whether it was within the  
6 reasonable control of the movant, and whether the movant acted in good faith." *Id.*  
7 Moreover, "'excusable neglect' covers negligence on the part of counsel." *Bateman v.*  
8 *United States Postal Service*, 231 F.3d 1220, 1223 (9th Cir. 2000).

9 The conduct of Plaintiff's counsel in this case was undeniably negligent. First,  
10 counsel failed to attend a scheduled hearing on Defendants' motion to dismiss Plaintiff's  
11 Complaint. Then, she failed to file an amended complaint within the time allotted by the  
12 Court in an Order that was issued following the hearing. Worst of all, after she learned of the  
13 missed court appearance and the elapsed deadline, she waited an additional three months to  
14 contact the Court. This failure to communicate with the Court was particularly striking in  
15 light of the fact that counsel had been previously admonished for a similar failure. *See* Order  
16 Re Plaintiff's August 21, 2009 Filing (Dkt. No. 12).

17 Balancing the factors set forth in *Pioneer*, the Court finds, however, that counsel's  
18 negligence constitutes "excusable neglect." Though counsel did not communicate with the  
19 Court for several months, counsel filed the instant motion only eight days after the Court  
20 dismissed Plaintiff's case and entered Judgment in Defendants' favor. Thus, the delay  
21 between the Court's entry of Judgment and the filing of the instant motion was not  
22 significant and had no impact on judicial proceedings. *See Bateman*, 231 F.3d at 1225  
23 (concluding that a sixteen day delay was "not long enough to justify denying [Rule 60(b)]  
24 relief").

25 Moreover, while, as in *Bateman*, Plaintiff's counsel's reasons for her neglect of her  
26 client's case are weak, "there is no evidence that [she] acted with anything less than good  
27 faith." *Id.* Her errors "resulted from negligence and carelessness, not from deviousness or  
28 willfulness." *Id.* The equities therefore largely favor granting the requested relief.

1 The Court is, however, somewhat concerned about the “danger of prejudice” to the  
2 Defendants. Defendants maintain that, in reliance on the Court’s entry of Judgment, they  
3 have “engaged in active marketing efforts to sell the subject real property.” Oppn. at 2.  
4 Specifically, Defendants assert that they have incurred the following out-of-pocket expenses  
5 in reliance on the Court’s Judgment:

6 (1) \$3,550.00 “in connection with a re-sod of the lawn and the installation of  
7 irrigation”; Mays Suppl Decl. ¶ 6 & Ex. 6(B).

8 (2) \$3,996.00 “for the painting of the interior of the house”; *Id.* and

9 (3) \$4,200.00 “as a result of the home’s carpet being replaced.” *Id.*

10 Defendants have submitted copies of invoices confirming these expenditures. Mays Suppl.  
11 Decl Ex. 6(B).

12 In light of the evidence submitted by Defendants, the Court finds that these expenses  
13 were actually incurred in reliance on the Court’s entry of Judgment and that Defendants may  
14 therefore suffer some prejudice, in the form of lost investments, if the Court grants Plaintiff’s  
15 motion.

16 At the same time, the Court is not certain that the prejudice Defendants will suffer is  
17 equal to the full amount of the expenses they have so far incurred. After all, if this case is  
18 resolved quickly and in Defendants’ favor, Defendants may not have to re-sod the lawn a  
19 second time, install another irrigation system, repaint the interior of the home, or install new  
20 carpeting. In such a circumstance, Defendants’ previous expenditures would not be wasted  
21 ones.

22 To minimize the possible prejudice to Defendants without also providing Defendants  
23 with a potential windfall, the Court imposes the following “just term,” *see* Fed. R. Civ. Pro.  
24 60(b), on Plaintiff’s request for relief from the judgment: To receive relief from the  
25 Judgment, Plaintiff must post a bond with the Clerk’s Office (to be deposited within the  
26 registry of the Court) in the amount of \$11,746.00 within 30 days of the date of this Order. If  
27 Plaintiff fails to post the bond within the requisite time period, Plaintiff’s Rule 60(b) motion  
28 will be DENIED.

1 If Plaintiff posts the bond, the motion will be GRANTED. The bond will then remain  
2 in the registry of the Court until Judgment is entered at the conclusion of Plaintiff's case.  
3 Within 30 days of the entry of that Judgment, Defendants may submit a request for  
4 reimbursement of any of the above expenses that turn out to be duplicative. For instance, if,  
5 at the conclusion of the case, Defendants must again re-paint the interior of the house, they  
6 can request reimbursement of the \$3,996.00 they unnecessarily paid to paint the house two  
7 months ago. On the other hand, if Defendants have no need to, for instance, install another  
8 irrigation system or re-sod the yard, they will not be entitled to reimbursement for such  
9 expenses. Any portion of the bond that is not paid to Defendants at the conclusion of the  
10 case will be returned to Plaintiffs.

11 **IT IS SO ORDERED.**

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13  
14 Dated: July 14, 2010



CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE